No. 296

In the Supreme Court of the United States

OCTOBER TERM, 1944

PANHANDLE EASTERN PIPE LINE COMPANY, ILLINOIS NATURAL GAS COMPANY, AND MICHIGAN GAS TRANSMISSION CORPORATION, PETITIONERS

v.

FEDERAL POWER COMMISSION, CITY OF DETROIT, MICH., COUNTY OF WAYNE, MICH., MICHIGAN CONSOLIDATED GAS COMPANY, AND MICHIGAN PUBLIC SERVICE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

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SUBJECT OF THIS BRIEF

This brief is filed by the respondents pursuant to the request of this Court, contained in a letter of October 7, 1944, from the Clerk, and is directed solely to the question raised in the Brief Amicus Curiae filed by the City of Cleveland, Ohio, on September 29, 1944: Whether the court below had jurisdiction over the subject matter of

this case under Section 19 (b) of the Natural Gas Act (52 Stat. 821, 15 U. S. C. §717r (b)), which provides:

> (b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. * * *

The respondents submit that the court below had jurisdiction to hear and decide this case, because:

I. The designation of the circuit wherein the company "is located or has its principal place of business" is a matter of venue and not jurisdic-

tion, and any possible objection to the venue of the court below has been waived.

II. In any event, the "natural-gas company to which the order relates" had "its principal place of business" in the Eighth Circuit.

STATEMENT

The Federal Power Commission's order here under review was entered under the Natural Gas Act on September 23, 1942, and required petitioner Panhandle Eastern Pipe Line Company, and its wholly-owned subsidiaries, petitioner Illinois Natural Gas Company and petitioner Michigan Gas Transmission Corporation, to reduce their interstate wholesale rates on and after November 1, 1942, by $5,094,384 per annum based on their consolidated revenues during the test year 1941 (R. I, 38–43). The petitioners filed a joint application for rehearing (R. XVI, 7141–7149) which the Commission denied by order of October 30, 1942 (R. XVI, 7150).

On November 18, 1942, the petitioners filed a joint petition for review under Section 19 (b) of the Act in the court below, the United States Circuit Court of Appeals for the Eighth Circuit (R. I, 1–14). The petition, which was sworn to by the president of each petitioner, stated that "each of Petitioners has it principal place of business in Kansas City, Jackson County, Missouri, within the jurisdiction of the Eighth Circuit Court of Appeals;" that petitioners together constitute "a

pipe line production transmission and marketing system owning large gas reserves in Texas, Oklahoma, and Kansas, and a pipe line with lateral lines connecting such reserves with markets in Texas, Kansas, Missouri, Illinois, Indiana, Ohio, and Michigan; and that "a substantial portion of the transmission facilities lie within the territory over which this Court has jurisdiction." (R. I, 6).

Upon petitioners' joint application, the court below on December 7, 1942, issued a stay of the Commission's order pending review, upon the condition *inter alia* that "the monthly difference between payments to petitioners under existing rates or arrangements and those required under the order of the Commission" be impounded with the custodian of the court "for the benefit of the ultimate consumers or of petitioners as in this litigation may be determined entitled thereto" (R. XVI, 7182).[1]

While the review proceeding was pending in the court below, on or about April 1, 1943, petitioner Panhandle Eastern acquired all the properties and assumed the liabilities of its wholly-owned subsidiaries, petitioners Illinois Natural Gas and Michigan Gas, which were then dissolved (Pet. 4, n. 1).[2]

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[1] The impounded funds now total some $15,000,000.

[2] The acquisition was approved by the Securities and Exchange Commission on April 1, 1943. *Re Panhandle Eastern Pipe Line Company, Illinois Natural Gas Company, Michigan Gas Transmission Corporation*, S. E. C. Holding Company Act Release No. 4212.

The court below heard argument on May 14, 1943, but deferred its decision pending this Court's disposition of *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591 (R. XVI, 7196). After this Court handed down its opinion in that case on January 3, 1944, the instant case, at the request of the court below, was resubmitted upon supplemental briefs and argument (R. XVI, 7196, 7197), and the court then entered its opinion and judgment on June 6, 1944, affirming the Commission's order (R. XVI, 7198, 7219). It is this order which the petition for certiorari herein seeks to review.

On June 19, 1944, after the court below had entered its decree affirming the Commission's order, the City of Cleveland, Ohio, which had not participated in the proceedings before the Commission or the court below, filed a motion in the court below, requesting "leave to intervene and be named a party respondent in this proceeding."[3] The stated purposes of the motion were (p. 6):

> (1) To oppose the granting of certiorari by the Supreme Court of the United States

[3] While this proceeding was pending in the lower court, a shortage of natural gas developed in the Appalachian area which includes the City of Cleveland. To alleviate this shortage, it was deemed advisable to make gas from the Panhandle Eastern system available to The East Ohio Gas Company which serves the City of Cleveland. Appropriate authorization of the necessary interconnecting facilities was issued by the Commission, with the concurrence of the War Production Board, on November 30, 1943. *Re East Ohio Gas Company*, 52 P. U. R. (N. S.) 91. Panhandle Eastern commenced the delivery of gas to East Ohio in October 1943.

to review the decree of this Honorable Court affirming the order of the Federal Power Commission reducing the rates of Panhandle Eastern Pipe Line Company if Panhandle applies for certiorari; (2) to participate in the defense of said decree and order in the Supreme Court of the United States if certiorari is granted; and (3) to protect the interest of the City of Cleveland and the ultimate consumers of gas within the City of Cleveland in the impounded fund.

The City raised no question in its motion as to the venue or jurisdiction of the court.[4] However, on August 28, 1944, just prior to argument on the motion, the City tendered for filing an "Intervening Petition" in which it requested that "the stay order be dissolved for lack of jurisdiction," or else "modified and conditioned to permit Panhandle to charge for the future no more than the interim rate fixed by the Federal Power Commission." The attack upon the jurisdiction was based upon the contention that "none of the natural-gas companies to which the * * * Commission's order relates was located within the Eighth Circuit" or had "its principal place of business within the Eighth Circuit" (p. 2).

The court below heard argument on the City's motion on September 2, 1944. The motion was

[4] The petition for certiorari herein was filed on July 28, 1944. Respondents' joint brief in opposition thereto was filed on September 3, 1944.

opposed by counsel for the Commission, the City of Detroit, and the County of Wayne, all respondents herein. Counsel for the petitioners also opposed the City's motion and, pursuant to leave granted at the argument, subsequently filed a memorandum of points and authorities, pointing out *inter alia* that the petitioners' principal place of business was in the Eighth Circuit; that the City's objection "that these proceedings were not brought in the proper circuit raises a question of venue and not a question of jurisdiction;" and that "venue in these proceedings has been waived." The court below took the motion under advisement.[1]

ARGUMENT

The amicus brief questions the jurisdiction of the court below over the subject matter on the ground that when the petition for review was filed, the petitioners were not "located" and did not have their "principal place of business" in the Eighth Circuit, within the meaning of Section 19 (b) of the Natural Gas Act. We submit that these contentions raise merely a question of venue, which has been waived; but even assuming that the objection is jurisdictional, it is clear from the record that the Eighth Circuit was the proper one for this proceeding.

[1] Suspension of the decision on the motion is of no practical effect, since the object of the motion was "to oppose the granting of certiorari" by this Court.

I

THE REFERENCE TO A PARTICULAR CIRCUIT IN SECTION 19 (b) OF THE ACT IS A MATTER NOT OF JURISDICTION BUT MERELY OF VENUE, WHICH CAN BE AND HAS BEEN WAIVED

Section 19 (b) of the Natural Gas Act provides that:

> Any party * * * aggrieved by an order issued by the Commission * * * may obtain a review of such order in the circuit court of appeals of the United States for *any* circuit wherein the natural-gas company to which the order relates *is located or has its principal place of business*, or in the United States Court of Appeals for the District of Columbia. [Italics supplied.]

The use of the comprehensive term "any circuit," plus the unqualified availability of the Court of Appeals for the District of Columbia, show a Congressional intention to vest *all* intermediate federal appellate courts with the power to review orders of the Commission, leaving the selection of the particular tribunal to the petitioner for review, subject only to objection by the respondent if the circuit selected possesses none of the qualifications specified in Section 19 (b). Since there is thus a general grant of power to all the courts of appeals, the question of which one should exercise that power in a particular case is a question of venue (*Camp* v. *Gress*, 250 U. S.

308, 311), and, unlike jurisdictional objections, the objection to the selection of a particular circuit can be waived. In *Neirbo Company* v. *Bethlehem Corporation*, 308 U. S. 165, 167–168, this Court said:

> The jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a law suit—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition. * * *

We submit that the decision of this Court in *Peoria Railroad Company* v. *United States*, 263 U. S. 528, should be dispositive of the City's contentions. In that case the Interstate Commerce Commission on petition of Minneapolis & St. Louis Railroad, a resident of Iowa, had issued an emergency order under the Transportation Act, 1920, requiring the Peoria & Pekin Union Railway Company to continue to interchange freight traffic with the Minneapolis Railroad. The Urgent Deficiencies Act provided that any suit to enjoin or annul such an order of the Interstate Commerce Commission should be brought in the district of the residence of the party on whose petition the order had been made. Although the Minneapolis Railroad, upon whose petition the order had been issued, was a resident of Iowa, the

Peoria Railroad brought suit against the United States to enjoin enforcement of the order in the federal district court for the Southern District of Illinois. The Minneapolis Railroad and the Commission intervened as defendants, without objecting to the venue of the court. The United States objected to such venue and the district court overruled the objection. The case was then heard upon application for a temporary injunction, which the court denied. The Peoria Company took a direct appeal to this Court; the United States did not cross-appeal. In urging affirmance in this Court of the decree dismissing the bill, the United States contended that the venue of the suit was in the district court of Iowa, since that was the residence of the Minneapolis Railroad on whose petition the I. C. C. order had been entered. In disposing of this contention, and reversing and remanding on the merits, Mr. Justice Brandeis, speaking for a unanimous court, stated (p. 535):

> * * * The provision that suit shall be brought in the district of the residence of the party on whose petition the order was made is obviously one inserted for his benefit. If there were a lack of jurisdiction in the district court over the subject matter, we should be obliged to take notice of the defect, even if not urged below by the appellee. *Mattingly* v. *Northwestern Virginia R. R. Co.*, 158 U. S. 53, 57. But the challenge is merely of the jurisdiction of the court for the particular district. The ob-

jection is to the venue. See *Camp* v. *Gress*, 250 U. S. 308, 311. This privilege not to be sued elsewhere can be waived; and it was waived both by the Minneapolis & St. Louis Railroad and the Commission. The United States was, nevertheless, entitled to insist upon compliance with the venue provision; and its objection was properly taken below. But by failure to enter a cross appeal from the court's action in overruling its objection, the right to insist upon it here was lost. The appellees can be heard before this Court only in support of the decree which was rendered. *The Maria Martin*, 12 Wall. 31, 40; *Bolles* v. *Outing Co.*, 175 U. S. 262, 268. We have, therefore, no occasion to consider whether the suit was brought in the proper district.

The venue prescribed in Section 19 (b) of the Natural Gas Act is clearly related to the convenience of the two parties who are principally interested in the review proceeding, namely, the Commission and the natural-gas company to which the order relates. Review in the Court of Appeals for the District of Columbia is convenient for the Commission, which is required by statute to maintain its "principal office" and hold its "general sessions" in the District of Columbia (Sec. 1 of the Federal Power Act). The provision for review in any circuit wherein the natural-gas company to which the order relates "is located or has its principal place of business," like the venue provision in the Urgent Deficiencies

Act, "is obviously one inserted for [the] benefit" of the company. Cf. *Peoria Railroad Company* v. *United States*, 263 U. S. 528, 535.

None of the respondents questioned the venue of the court below, and they do not now seek to do so. The City of Cleveland, as an applicant for intervention, was required to take the case as it found it and could not attack the judgment which had already been rendered when it filed its motion to intervene. *United States* v. *California Canneries*, 279 U. S. 553, 556; *Vinson* v. *Washington Gas Company*, 321 U. S. 489, 499. But even if the City had been permitted to intervene, it would have waived any objection to venue, since it did not question the venue or jurisdiction of the court below when it filed its motion. The City's position can surely be no better in this regard where it has not been permitted to become

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The Urgent Deficiencies Act granted jurisdiction in one sentence to "the several district courts of the United States" over suits to enjoin or annul an I. C. C. order, and in another sentence provided that "the venue" of such suits relating to transportation should be in the district wherein resides the party on whose petition the order was made (Act of October 22, 1913, c. 32, 38 Stat. 219; 28 U. S. C. § 41 (28), § 43).

Section 19 (b) of the Federal Power Act contains the grant of jurisdiction and the specification of venue in the same sentence, without using the term "venue." But we do not think this circumstance is material, for in both statutes the designation of a particular court centers "on the convenience of the private parties involved." Final Report, Attorney General's Committee on Administrative Procedure (1941), pp. 93–94.

a party to the proceeding. In any event, the legislative history of Section 19 (b) shows conclusively that the convenience of the company and the Commission is alone relevant.

A serious difficulty would be presented if the specification of a particular circuit in Sec. 19 (b) were held to be jurisdictional. Since, as the *amicus* points out (Br. 12–13), suit against the Federal Power Commission is based upon a waiver of sovereign immunity, a judgment rendered without jurisdiction would not be *res judicata* on the jurisdictional question. Compare *United States* v. *United States Fidelity Co.*, 309 U. S. 506, 514. Consequently, unless the view urged herein is adopted, a judgment rendered under Sec. 19 (b) might be subject to collateral attack in another circuit if that court should find that the company's principal place of business was located elsewhere than had theretofore been assumed.

Section 19 (b) is derived from Section 313 (b) of the Federal Power Act of 1935. As originally drafted, Section 313 (b) of the Power Act would have permitted "*any person aggrieved*" by an order of the Commission to file a petition for review of such order in the Circuit Court of Appeals "for any circuit wherein *such person* resides or has his principal place of business" or in the Court of Appeals for the District of Columbia (S. 1725, 74th Cong., 1st Sess.). In the bill which was enacted (S. 2796, 74th Cong., 1st Sess.), this was changed to permit review in any circuit in which *the company* to which the order relates is located or has its principal place of business."

II

PETITIONERS' PRINCIPAL PLACE OF BUSINESS WAS IN THE EIGHTH CIRCUIT AT THE TIME THE PETITION FOR REVIEW WAS FILED.

Even if the reference to "principal place of business" in Section 19 (b) of the Act relates to jurisdiction, it is clear from the record that the court below properly acquired jurisdiction over the proceeding since at the time of the filing of the petition to review the principal place of business of Panhandle Eastern and its wholly-owned subsidiaries Illinois Natural and Michigan Gas was in the Eighth Circuit.

The petition for review alleged, under the oath of the president of each of the petitioners, that the principal place of business of each petitioner was in Kansas City, Missouri, which lies within the Eighth Circuit (R. 4, 6). This allegation, unchallenged by any of the parties to this cause, is fully supported by the facts of record.

Panhandle Eastern produces, purchases and gathers natural gas in Texas and Kansas, which it transports to markets along its main transmission line extending a distance of about 860 miles from Moore County, Texas, through the States of Oklahoma, Kansas, Missouri and Illinois to the Illinois-Indiana boundary. At that point, the gas is delivered into a main transmission line extending to Zionsville, Indiana, where the line branches to

Detroit, Michigan, and to Muncie, Indiana. This line was owned by Panhandle Eastern's subsidiary, Michigan Gas, until on or about April 1, 1943, while the proceedings below were pending, when Panhandle Eastern acquired the line and dissolved Michigan Gas. A number of lateral lines extending from Panhandle Eastern's main line in Illinois were owned by Panhandle Eastern's subsidiary, Illinois Natural. These lines were also acquired by Panhandle Eastern and Illinois Natural was dissolved on or about April 1, 1943 (R. I, 18; Pet. 4, n. 1).

Moreover, even prior to such acquisition, Panhandle and its subsidiaries, Michigan Gas and Illinois Natural, were "operated as a single system for the production, gathering, transportation and sale in interstate commerce of natural gas" (R. I, 18). Throughout the proceedings before the Commission, the three companies were treated as a single unit. The Commission issued one order requiring a reduction of rates based on the consolidated revenues and expenses of the three companies (R. I, 38–43). As stated in the Commission's opinion, it was "not controverted that the separate corporate entities may be disregarded" (R. I, 18).

The record shows that each of petitioners maintained its "principal business office" and kept its general corporate books and records at 1221 Balti-

more Avenue, Kansas City, Missouri.* This office was the headquarters of petitioners' vice president in charge of operations, chief engineer, production engineer, rate engineer, geologist, chief accountant and assistant treasurer, and assistant secretary (R. III, 1052; R. IX, 4103, 4215; R. X, 101, 152). The secretary-controller of the three petitioners spent a "vast amount of time" in that office (R. VI, 2616). The Kansas City office was the nerve center of the petitioners' natural gas operations from which the companies' telephone and telegraph lines radiated throughout the system, and from that office the chief gas dispatcher controlled pressures and issued instructions to the various compressor stations and to the field headquarters (R. IV, 1983–1986). The principal banking activities were also located in Kansas City at the Commerce Trust Company, where cash balances of $700,000 to $900,000 were maintained and against which 25,000 to 30,000 checks per year were drawn (R. III, 1364, 1384).

Moreover, a substantial portion of Panhandle Eastern's properties is located in Missouri, in the Eighth Circuit. More than 762 miles of pipelines are located in that State serving gas to 37 communities (R. IX, 4092–4093, 4101). These

*This is stated under oath in the 1941 and 1942 Annual Reports filed by the petitioners with the Commission, the former of which was incorporated into the record of the proceedings before the Commission by reference to its files (R. VIII, 4005–5096).

markets were characterized by petitioners' president as "very important" (R. VIII, 3943).

These facts of record establish clearly that each of the petitioners had its "principal place of business" in the Eighth Circuit within the meaning of the Natural Gas Act. It is significant that the brief amicus, while denying that the principal place of business of petitioners is in the Eighth Circuit, does not undertake to specify where that principal place of business is.

There is no merit in the contention of the amicus (Br. 17) that when the Commission's order relates to more than one natural gas company and such companies have their principal places of business in different circuits, "Congress has consented to suit against the United States only in the United States Court of Appeals for the District of Columbia." As above stated, the provision for venue in the Court of Appeals of the District of Columbia is primarily intended for the convenience of the Commission, and the Commission has not urged that such venue should be availed of here. Moreover, the statute contemplates that the Commission, in the light of its intimate knowledge of the operations of natural gas companies, will have the principal concern as to the venue of proceedings involving review of its orders. And to avoid unnecessary disputes with respect to such venue, Section 19 (b) of the Act provides that when the Commission has filed in a circuit court of appeals the "transcript of

the record upon which the order complained of was entered" such court "shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part." See *Columbia Oil and Gasoline Corporation* v. *S. E. C.*, 134 F. (2d) 265 (C. C. A. 3); *L. J. Marquis and Co.* v. *S. E. C.*, 134 F. (2d) 822 (C. C. A. 3); *Standard Oil Co.* v. *National Labor Relations Board*, 114 F. (2d) 743 (C. C. A. 8).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the court below had jurisdiction of the proceedings before it, and that the petition for certiorari should be denied for the reasons noted in our brief in opposition.

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